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No. 90-1280

In the Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A).

2. Whether adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment.

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OPINIONS BELOW

The opinion of the court of appeals holding that it has appellate jurisdiction and reinstating its previous opinion and judgment, Pet. App. A1-A6, is unreported. This Court's order vacating the court of appeals' previous judgment and remanding for consideration of the jurisdictional issue raised by the United States, Pet. App. A10-A11, is reported at 111 S. Ct. 425. The previous opinion of the court of appeals, Pet. App. A12-A33, is reported at 896 F.2d 1394. The opinions of the district court, Pet. App. A34-A47, and the bankruptcy court, Pet. App. A48-A51, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1991. The petition for a writ of certiorari was

filed on February 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 151, 157, and 1411 of Title 28 of the United States Code are reproduced in an appendix to this brief.

STATEMENT

Respondent Ben Cooper, Inc. (Cooper), is an importer and manufacturer of costumes and toys. Petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc., are an insurance company and an insurance brokerage corporation, respectively. After Cooper filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, petitioners contracted with the bankruptcy estate (through Cooper, as the debtor-in-possession) to insure the *res* of the estate. A fire at one of the estate's facilities led to a dispute over the insurance contract, and the insurance company brought a declaratory judgment action in New York state court to rescind the contract.

As we shall describe more fully below, the bankruptcy court, at Cooper's behest, stayed the state court proceedings. Cooper then filed its own adversary proceeding in the bankruptcy court seeking payment of its insurance claim and punitive damages. For their part, petitioners urged the district court to withdraw the proceeding from the bankruptcy court under 28 U.S.C. 157(d) on the grounds that it was not a core proceeding and that it was triable to a jury as of right. The district court agreed and withdrew the proceeding. In addition, the district court abstained in favor of the state court litigation and dissolved the bankruptcy court's injunction staying that litigation. The court of appeals reversed, holding that the proceedings were core and that the bankruptcy court could preside over a jury trial.

1. This matter commenced in April 1988 when Cooper filed its petition for reorganization in the United States District Court for the Southern District of New York. In October 1988, Cooper—as the debtor-in-possession of the bankruptcy estate—purchased a policy to insure the estate's commercial facilities.[1] The insurance was required under the reorganization plan then pending in the bankruptcy court. Petitioners were aware that the policy was sold to a debtor-in-possession, acting on behalf of a bankruptcy estate, and that the policy's subject matter constituted assets of that estate. Pet. App. A15, A23; see note 1, *supra*.

On January 6, 1989, a fire damaged one of the facilities of the bankruptcy estate. The insurer refused to pay the claim tendered by Cooper (as debtor-in-possession) on behalf of the estate. The insurer contended that the policy was invalid because the application had misrepresented the facility to be a warehouse when in fact it was a manufacturing plant. The insurer also asserted that it was not liable on the policy because the claim exaggerated the fire damage. Pet. App. A15-A16.

Subsequently, on April 4, 1989, the bankruptcy court confirmed the reorganization plan. Pet. App. A15. On that date, title to the estate's property was transferred from the estate to Cooper. See 11 U.S.C. 541(a), 1141.

On April 18, 1989, the insurer filed an action in New York state court to declare the policy invalid. On May 9, 1989, Cooper obtained an order from the bankruptcy court staying the state court proceedings. Soon thereafter, Cooper instituted an adversary proceeding in bankruptcy court claiming that the insurer was liable for payment of the insurance claim and that the insurance brokers were liable for

[1] The estate was being administered by the debtor-in-possession, as opposed to a trustee. See 11 U.S.C. 1107. Accordingly, petitioners corresponded with and received checks for the insurance premiums from "Ben Cooper, Inc., D.I.P."

negligence if the policy was held void. Petitioners opposed the bankruptcy court's jurisdiction, demanded a jury trial, and moved the district court to withdraw the proceedings from the bankruptcy court. Pet. App. A16-A17.

2. The district court remanded the proceeding to the bankruptcy court and instructed it to determine whether it was "core" or "non-core" under 28 U.S.C. 157. On remand, the bankruptcy court determined that the proceeding was core. Pet. App. A49-A51. Then, on petitioners' motion, the district court reexamined the matter and held that the proceeding was not core. Pet. App. A35-A38. The district court further held that petitioners were entitled to a jury trial. Pet. App. A39-A40. Believing that bankruptcy courts could not conduct jury trials in non-core proceedings, Pet. App. A39-A40, the district court withdrew the reference to the bankruptcy court:

> The necessity of preserving [petitioners'] right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157(d).

Pet. App. A40; accord Pet. App. A39. Rather than try the case itself, the district court abstained under 28 U.S.C. 1334(c)(1) and (2) in favor of the action that had been filed in New York state court and dissolved the bankruptcy court's injunction staying those actions. Pet. App. A40-A47.

3. Cooper appealed to the Second Circuit, which reversed. Pet. App. A12-A33. The court of appeals held that (1) the dispute was a core bankruptcy proceeding; (2) petitioners had a right to a jury trial; (3) the statute authorizes jury trials in bankruptcy courts; and (4) neither Article III nor the Seventh Amendment bars bankruptcy judges from presiding over such trials. First, the court of appeals held that the proceeding was within the core jurisdiction of the bankruptcy court because it was a "matter[] concerning the

administration of the estate" under 28 U.S.C. 157(b)(2)(A). Pet. App. A18. The court relied on several factors in determining that this insurance contract dispute was a core matter: the dispute involves a post-petition contract made with the debtor-in-possession, who serves as an officer of the bankruptcy court; the facility insured was an asset of the estate; insurance of the assets of the estate was part of the reorganization plan; and petitioners were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. Pet. App. A23. The court of appeals reasoned that Congress intended bankruptcy courts to adjudicate such disputes as core matters, despite the fact that they implicate state law, because they lie "at the heart of the administration of the bankrupt estate." Pet. App. A21. The court of appeals concluded that it "is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." Pet. App. A23.

Second, the court of appeals held that petitioners are entitled to a jury trial because their claims are legal in nature. Pet. App. A28-A29. The court of appeals explained that Cooper's dispute with the insurer alleged a breach of contract, and its dispute with the insurance brokers alleged negligence and malpractice. *Ibid.* These legal claims for money damages are, the court stated, triable to a jury under the Seventh Amendment. *Ibid.*

Third, the court of appeals held that bankruptcy courts have statutory authority to conduct jury trials in core proceedings. That holding rested on the combined effect of "two separate but related provisions." Pet. App. A30. The first provision, 28 U.S.C. 151, provides that bankruptcy courts "may exercise the authority conferred under this chapter with respect to any action." The second provision, 28 U.S.C. 157(b), states that bankruptcy courts have authority to conduct trials and issue final orders in core proceedings.

Reading the two provisions together, the court of appeals reasoned that Congress intended bankruptcy courts to enter final orders in all core proceedings, even those triable to a jury. Pet. App. A30.

Finally, the court of appeals concluded that this authority does not violate Article III of the Constitution or the Seventh Amendment. The court of appeals held that jury trials in bankruptcy court do not violate the Seventh Amendment, because no facts found by the jury would be reexamined by the district court, which exercises only appellate review over judgments in core bankruptcy proceedings. Pet. App. A31-A32. Nor would jury trials in bankruptcy court violate Article III, because "[i]f bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A32-A33. Accordingly, the court of appeals reversed the district court's judgment and remanded the case to the bankruptcy court. Pet. App. A15.

4. Petitioners sought review in this Court, see petition for cert. in No. 89-1784, citing a conflict between the decision below and a decision of the Eighth Circuit holding that bankruptcy courts have no statutory authority to conduct jury trials, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990).[2] On June 28, 1990, this Court granted the petition for a writ of certiorari. 110 S. Ct. 3269.

On September 28, 1990, the United States moved to intervene as of right under 28 U.S.C. 2403 and to file a brief in intervention. The Court granted that motion. 111 S. Ct. 241 (1990). The brief filed by the United States raised and addressed a question concerning the jurisdiction of the court of appeals, concluding that that court had jurisdiction because the district court's order withdrawing the reference

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[2] The Eighth Circuit has since been joined by the Tenth Circuit. See *In re Kaiser Steel Corp.*, 911 F.2d 380 (1990).

to the bankruptcy court (which is ordinarily interlocutory) was appealable as part of the district court's decision abstaining in favor of the state court litigation under 28 U.S.C. 1334(c)(1) and (2). Although our brief observed that abstention decisions with respect to non-core matters are "not reviewable by appeal or otherwise," 28 U.S.C. 1334(c)(2), it explained that the district court's order was appealable in this case precisely because it did involve a core matter.

On November 13, 1990, the Court vacated the judgment of the court of appeals and remanded the case "for consideration of the jurisdictional issue raised by the United States." Pet. App. A11.

5. On November 27, 1990, the court of appeals directed the simultaneous filing of briefs on the jurisdictional issue. On January 22, 1991, the court of appeals "conclude[d] in the exercise of our independent judgment that we ha[ve] jurisdiction." Pet. App. A3. Although the parties "reach[ed] this result by different analyses," the court of appeals "agree[d] with the analysis of the Solicitor General." *Ibid.*; see Pet. App. A5-A6. The court then reinstated its previous opinion and judgment. Pet. App. at A6.

DISCUSSION

1. This case presents the important questions, reserved by this Court in *Granfinanciera S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2802 (1989), whether the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, authorizes non-Article III bankruptcy courts to conduct jury trials, and, if so, whether that authority is consistent with Article III and the Seventh Amendment. The Second Circuit in this case held that the Act permits bankruptcy judges to preside over jury trials and that such power is constitutional. In contrast, the Eighth and Tenth Circuits have held that bankruptcy judges have no statutory

authority to conduct jury trials. See *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d at 1454-1457 (8th Cir.); *In re Kaiser Steel Corp.*, 911 F.2d 380, 392 (10th Cir. 1990).

Prompt resolution of those questions is of the utmost importance to the efficient functioning of the bankruptcy court system. In 1978, after almost ten years of study and investigation, Congress enacted the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (repealed). The 1978 Act represented the first comprehensive revision of the bankruptcy system since 1898. Among other purposes, it was designed to reduce the serious delays in bankruptcy proceedings caused by the crowded dockets of non-bankruptcy courts. This Court held the 1978 Act's grant of jurisdiction to bankruptcy courts unconstitutional in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In response, Congress enacted the legislation challenged in this case—the Bankruptcy Amendments and Federal Judgeship Act of 1984. Congress, in the 1984 Act, intended to conform the bankruptcy system to the requirements of Article III as determined by this Court. The public has a significant interest in this Court's early determination whether the revised bankruptcy system comports with constitutional requirements.

2. Before reaching those questions, the Court should determine whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A), and whether such disputes are triable by jury as of right under the Seventh Amendment. The Court's answer to the questions of the bankruptcy court's statutory and constitutional authority to conduct jury trials may depend on whether post-petition contractual disputes are "core" or "non-core." The bankruptcy court has authority to "hear and determine" core matters, 28 U.S.C. 157(b)(1), but may only "submit proposed findings of fact

and conclusions of law to the district court" in non-core matters, unless the parties consent to the bankruptcy court's determination, 28 U.S.C. 157(c)(1) and (2). In addition, the need for this Court to pass on the bankruptcy court's statutory and constitutional authority to conduct jury trials would be obviated in this class of cases if the Court decided that post-petition contractual disputes do not give rise to a right to jury trial under the Seventh Amendment.

The Court issued a writ of certiorari in this case once before, remanding for consideration of the court of appeals' appellate jurisdiction. The court of appeals has now resolved that issue, and the case is ripe for this Court's review.[3]

3. In the interests of judicial economy and the prompt resolution of the important questions presented, we believe that the Court should grant the petition for certiorari, order that the case be considered on the briefs previously submitted, and set the case for argument during the Court's April sitting.[4] The briefs previously filed fully address both the merits and the jurisdictional issue, which has now been addressed and decided by the court of appeals. It is our understanding that all parties – petitioners and respondent Ben Cooper, Inc., in addition to the United States – would agree to submitting this case for decision on that basis if the Court is inclined to hear the case this Term.

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[3] For the reasons stated in the government's brief on the merits in this Court in *Insurance Company of the State of Pennsylvania* v. *Ben Cooper, Inc.*, No. 89-1784 (at 9-17), and in its brief on the jurisdictional issue in the Second Circuit, we believe that the Second Circuit had jurisdiction, and this Court has jurisdiction, if (but only if) this case falls within the core bankruptcy jurisdiction. As explained in our brief, if this Court determines that this case is a non-core proceeding, the court of appeals and, by extension, this Court would lack jurisdiction to reach the merits.

[4] We also believe that argument should be divided as the Court previously ordered in this case. See 111 S. Ct. 292 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

2. 28 U.S.C. 157 provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13, of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the estate or the adjustment of the debtor- creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding

shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. 28 U.S.C. 1411 provides:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

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